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HEARING OFFICER OF THE
SUPREME COURT OF ARIZONA
BY CLM

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**BEFORE A HEARING OFFICER OF
THE SUPREME COURT OF ARIZONA**

IN THE MATTER OF A MEMBER OF
THE STATE BAR OF ARIZONA,

No. 05-0921

JOSUE-ALFONSO MUNOZ S.,
Bar No. 014571

**HEARING OFFICER'S REPORT
AND RECOMENDATION**

Respondent.

PROCEDURAL HISTORY

A Probable Cause Order was filed on February 10, 2006 and a single-count Complaint was filed on March 24, 2006. Respondent filed his Answer on April 26, 2005. Prior to any settlement conference, the State Bar of Arizona ("State Bar") and Respondent filed a Tender of Admissions as well as a Joint Memorandum in Support of Agreement for Discipline by Consent ("Joint Memo"). No hearing has been held in this matter.

FINDINGS OF FACT

1. At all relevant times, Respondent was an attorney licensed to practice law in the State of Arizona, having been admitted to practice in Arizona on October 24, 1992.
2. On or about May 20, 2005, a check in the amount of \$110 attempted to pay against Respondent's client trust account at Bank of America (the "Account") when the balance in the Account at the time was \$44.68. The bank paid the check, and did not charge Respondent an overdraft fee, leaving the Account with a negative balance of \$65.32.
3. The State Bar received a copy of the insufficient funds notice on the Account and opened a screening investigation. Respondent was requested to provide an explanation of the cause

1 of the overdraft, along with supporting documentation.

2 4. Respondent submitted his response on July 15, 2005, explaining that his office
3 specializes in immigration law and that a great part of his practice involves filing application forms
4 with the U.S. Bureau of Immigration and Citizenship Services, which filings require a set fee.

5 5. Respondent stated that his office policy has always been to ask clients to deliver the
6 required fees either by money order or cashier's check to avoid use of the Account. However,
7 Respondent stated that, in this case, on May 6, 2005, a client brought the fee amount in cash, rather
8 than by money order or cashier's check.

9 6. Respondent stated that, due to an administrative error, the \$110 in cash was
10 deposited in the firm's general account, rather than in the Account, which led to the overdraft in the
11 Account. Respondent stated that, upon discovering the error on May 16, 2005, he transferred \$110
12 from the operating account to the Account to cover the check. Respondent identified the client for
13 whom he deposited the \$110 as Moreno-Gallardo.

14 7. In response to a request from the State Bar for additional records, Respondent
15 submitted a response and some of the records requested, but stated he does not have individual
16 client ledgers or bank fees/administrative funds ledgers and that his practice makes little use of the
17 Account. Respondent also does not keep a general ledger or check register.

18 8. The Records Examiner performed a review of the records provided by Respondent
19 and determined that Respondent's explanation of the overdraft in the Account was not accurate.
20 Respondent initially stated that the \$110 cash on behalf of client Moreno-Gallardo was
21 inadvertently deposited into the firm's operating account instead of the Account on May 6, 2005
22 and that, once he realized the mistake, Respondent transferred \$110 from his operating account into
23 the Account. Respondent's bank records confirm that this transfer deposit was made on May 16,
24 2005. However, the bank records also show that \$560 was deposited into the Account on May 6,
25 2005, and \$110 of that deposit was identified as cash on the deposit slip, and later identified by
26 Respondent as being for client Moreno-Gallardo. Therefore, the appropriate deposit was made to
27 the Account on May 6, 2005. Nonetheless, Respondent deposited an additional \$110 into the
28 Account for the same client on May 16, 2005. Even with the double deposit, the Account was still

1 | overdrawn when he disbursed the \$110 on May 20, 2005.

2 | 9. The balance in the Account on May 20, 2005, before the disbursement, was only
3 | \$44.68 and, as such, there were already insufficient funds in the account, despite Respondent
4 | transferring \$110 into the Account on May 16, 2005.

5 | 10. Because Respondent does not keep the required trust account records, and his
6 | explanation of the overdraft was not accurate, the true cause of the overdraft could not be
7 | determined.

8 | 11. After check 1027 was disbursed on May 20, 2005, the Account was left with a
9 | negative balance of \$65.32 and, on June 10, 2005, Respondent made a telephone transfer of \$70
10 | into the Account from his operating account to remedy the negative balance.

11 | 12. Review of the Account records submitted by Respondent, along with his
12 | explanations, revealed that Respondent:

13 | a. failed to properly safeguard client funds; and that Respondent did not keep
14 | adequate records;

15 | b. failed to exercise due professional care in the performance of his duties as is
16 | required by Rule 43(d)(1)(A) and (d)(1)(B) regarding the overdraft and other record-keeping
17 | violations;

18 | c. failed to record all transactions promptly and completely as is required by
19 | Rule 43(d)(1)(D), did not maintain individual client ledgers or administrative funds ledgers, and
20 | did not maintain an adequate general ledger or check register or the equivalent in which to record
21 | transactions;

22 | d. failed to maintain or cause to be maintained an account ledger of the
23 | equivalent for each client in violation of Rule 43(d)(2)(C);

24 | e. failed to make a complete monthly three-way reconciliation of the client
25 | ledgers, trust account general ledger or register, and trust account bank statement as required by
26 | Rule 43(d)(2)(D);

27 | f. failed to maintain duplicate deposit slips of the equivalent to detail each item
28 | as required by Rule 43(d)(2)(B); and

g. failed to make trust account disbursements by pre-numbered check or by electronic transfer in accordance with Rule 43(d)(4).

13. Respondent violated the Rules of Professional Conduct by failing to safeguard client funds and by failing to comply with the trust account guidelines.

CONDITIONAL ADMISSIONS

Respondent conditionally admits that his conduct as set forth above violated Rule 42, Ariz.R.S.Ct., ER 1.15 and Rules 43 and 44.

ABA STANDARDS

The Supreme Court and the Disciplinary Commission consistently use the American Bar Association's *Standards for Imposing Lawyer Sanctions* ("Standards" or "Standard ____") to determine appropriate sanctions for attorney discipline. See *In re Clark*, 207 Ariz. 414, 87 P.3d 827 (2004); *In re Peasley*, 208 Ariz. 27, 90 P.3d 764, §§ 23, 33 (2004). The *Standards* are designed to promote consistency in sanctions by identifying relevant factors the court should consider and then applying these factors to situations in which lawyers have engaged in various types of misconduct. *Standard 1.3, Commentary.*

In determining an appropriate sanction, the court and the Disciplinary Commission consider the duty violated, the lawyer's mental state, the presence or absence of actual or potential injury, and the existence of aggravating and mitigating factors. *In re Tarletz*, 163 Ariz. 548, 554, 789 P.2d 1049, 1055 (1990); *Standard 3.0.*

Given the conduct in this matter, the parties agree that it is most appropriate to consider *Standard 4.0 (Violations of Duties Owed to the Client).*

4.1 Failure to Preserve Client's Property

4.13: Reprimand [censure in Arizona] is generally appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client.

A. The duty violated

Respondent violated his duties to his clients by failing to observe the rules governing the treatment of client funds by attorneys. These rules are designed to ensure that a client's money is not put in jeopardy, or used or taken improperly, by the client's attorney. Although Respondent

1 asserts that he was merely negligent in failing to realize that his treatment of client funds was
2 improper, he had an affirmative duty to familiarize himself with the rules governing his practice of
3 law in Arizona. In addition, Respondent violated his duties to clients by failing to act with
4 reasonable diligence and promptness in maintaining appropriate records relating to their
5 representation. Respondent violated his duties to the legal system and to the profession by failing
6 to comply with the ethical rules, in particular the trust account rules. Respondent admits that his
7 conduct, taken as a whole, has violated his duty to clients, the profession, and the legal system.

8 **B. The lawyer's mental state**

9 The parties agree that Respondent was negligent in failing to be aware of, familiarize
10 himself with, and comply with the rules governing the treatment of client funds by attorneys.

11 **C. The potential or actual injury caused by Respondent's conduct**

12 There was potential injury to clients in Respondent's rule violations. Respondent's failure to
13 comply with the rules governing treatment of client funds exposed his clients to potential injury by
14 causing their funds to be held without the protections against intentional or inadvertent
15 misdirection or depletion that are provided through strict compliance with ER 1.15 and Rules 43
16 and 44, Ariz.R.S.Ct.

17 **D. The aggravating and mitigating circumstances**

18 The parties agree that one aggravating factor should be considered: *Standard 9.22(i)*
19 (substantial experience in the practice of law). Respondent has been admitted to practice in
20 Arizona since 1992.

21 The parties also agree that the following factors should be considered in mitigation:

22 (1) *Standard 9.32(b)*: Absence of a dishonest or selfish motive. Respondent
23 did not act out of any dishonest or selfish motive. Rather, the parties have agreed that
24 Respondent's state of mind in the misconduct was negligent.

25 (2) *Standard 9.32(e)*: Full and free disclosure to disciplinary board or
26 cooperative attitude toward proceedings. Respondent admitted that he had mismanaged his
27 trust account and cooperated with the State Bar during the trust account investigation and
28 exchange of information and records.

1 Although Respondent violated his fiduciary duty with regard to the Account, Respondent's
2 conduct was negligent rather than intentional and there is no evidence that any client was harmed
3 by Respondent's actions. As such, censure is the presumptive sanction.

4 PROPORTIONALITY REVIEW

5 To have an effective system of professional sanctions, there must be internal consistency
6 and it is appropriate to examine sanctions imposed in cases that are factually similar. *Peasley*,
7 *supra*, 208 Ariz. at ¶ 33, 90 P.3d at 772. However, the discipline in each case must be tailored to
8 the individual case, as neither perfection nor absolute uniformity can be achieved. *Id.* at 208 Ariz.
9 at ¶ 61, 90 P.3d at 778 (citing *In re Alcorn*, 202 Ariz. 62, 76, 41 P.3d 600, 614 (2002); *In re Wines*,
10 135 Ariz. 203, 207, 660 P.2d 454, 458 (1983)).

11 The most serious instance of misconduct in this case involves Respondent's failure to be
12 aware of, familiarize himself with and comply with, the rules governing the treatment of client
13 funds. The following cases are instructive concerning these types of misconduct.

14 In *In re Davis*, SB-05-0148-D (2005), Davis received censure, with one year of probation
15 for violations of trust account rules. Davis failed to properly safeguard client funds, failed to hold
16 property of clients separate from his own property, failed to exercise due professional care in the
17 maintenance of his client trust account and failed to properly supervise employees or others
18 assisting in the performance of his duties under the trust account guidelines. He also failed to
19 maintain proper internal controls, record all transactions promptly and completely, failed to
20 maintain records, failed to maintain an account ledger and failed to conduct monthly reconciliations
21 of the trust account.

22 Davis' conduct was found to be negligent with potential injury to his clients. There were
23 three aggravating factors present: a pattern of misconduct, multiple offenses and substantial
24 experience in the practice of law. There were five mitigating factors present: absence of a prior
25 disciplinary record; absence of dishonest or selfish motive; timely good faith effort to make
26 restitution or to rectify consequences of misconduct; and full and free disclosure to disciplinary
27 board or cooperative attitude toward proceedings. In this case, Respondent has similar trust
28 account violations, without the aggravating factors present of a pattern of misconduct or multiple

1 offenses.

2 In *In re Wicks*, SB-05-0140-D (2005), Wicks received censure, with one year of probation
3 for violations of trust account rules. Wicks failed to properly safeguard client funds, failed to
4 exercise due professional care in the maintenance of his client trust account and failed to keep his
5 funds separate from that of his clients by depositing earned client funds into the trust account. He
6 also failed to maintain complete trust account records for a period of five years, failed to maintain
7 proper internal controls, failed to record all transactions to the trust account promptly and
8 completely and failed to conduct monthly reconciliations of the trust account.

9 Wicks' conduct was found to be negligent with potential injury to his clients. There were
10 two aggravating factors present: prior disciplinary offenses and substantial experience in the
11 practice of law. There were three mitigating factors present: absence of dishonest or selfish motive;
12 full and free disclosure to disciplinary board or cooperative attitude toward proceedings; and
13 remoteness of prior offenses.

14 In *In re Inserra*, SB-02-0144-D (2002), Inserra received a censure, with two years of
15 probation and costs. Inserra failed to keep his earned fees separate from client funds held in his
16 trust account, failed to transfer fees from his trust account when earned, and commingled his own
17 funds with those of his clients. He also failed to maintain complete trust account records for a
18 period of five years, failed to exercise due professional care in the maintenance of his trust account,
19 failed to only disburse from his trust account with pre-numbered checks, and failed to conduct a
20 monthly reconciliation of his trust account. There was one aggravating factor present: multiple
21 offenses. There were five mitigating factors present: absence of a prior disciplinary record; absence
22 of dishonest or selfish motive; timely and good faith effort to rectify consequences of misconduct;
23 full and free disclosure; and remorse.

24 In *In re Randall*, SB-02-0146-D (2002), Randall received a censure without probation.
25 Randall failed to conduct proper monthly reconciliations, failed to use pre-numbered checks as
26 required by the Guidelines, and also deposited and commingled his own separate funds, including
27 earned fees, with client funds in his trust account. He failed to maintain adequate funds in the trust
28 account resulting in the account being overdrawn on two occasions. There was one aggravating

1 factor of substantial experience in the practice of law present. There were five mitigating factors
2 present: absence of a prior disciplinary record; timely good faith effort to rectify consequences of
3 misconduct; full and free disclosure to the disciplinary board; character and reputation; and
4 remorse. Randall was not placed on probation, presumably because he was no longer working as a
5 sole practitioner and was employed by a medium-size firm where he was not in charge of any
6 accounting procedures.

7 In *In re Goff*, SB-01-0152-D (2001), Goff received censure, with two years of probation.
8 Goff had three trust account violations for checks drawn on his account resulting in a negative
9 balance and he also commingled his personal funds with trust account funds. Although there was
10 no evidence of actual harm to a client, the attorney did not properly identify his trust account as
11 such, did not keep a correct running balance of old journal or register transactions, and did not have
12 individual client ledgers. In addition, he paid his bar dues, phone bills and other personal expenses
13 with trust account funds. The Disciplinary Commission unanimously recommended acceptance of
14 the agreement and joint memorandum noting that ABA Standard 4.13 allowed for reprimand
15 (censure) where an attorney was negligent in dealing with client property.

16 In this case, Respondent failed to properly safeguard client funds, exercise due professional
17 care, record all transactions promptly and completely, maintain proper trust account records and make
18 all trust account disbursements by pre-numbered check or electronic transfer. The Supreme Court
19 "has long held that 'the objective of disciplinary proceedings is to protect the public, the profession
20 and the administration of justice and not to punish the offender.'" *In re Alcorn*, 202 Ariz. 62, 74,
21 41 P.3d 600, 612 (2002) (quoting *In re Kastensmith*, 101 Ariz. 291, 294, 419 P.2d 75, 78 (1966)).
22 The State Bar and Respondent believe that the sanctions proposed here are consistent with these
23 principles.

24 RECOMMENDATION

25 The purpose of lawyer discipline is not to punish the lawyer, but to protect the public and
26 deter future misconduct. *In re Fioramonti*, 176 Ariz. 182, 187, 859 P.2d 1315, 1320 (1993). It is
27 also the objective of lawyer discipline to protect the public, the profession and the administration of
28 justice. *In re Neville*, 147 Ariz. 106, 708 P.2d 1297 (1985). Yet another purpose is to instill public

1 confidence in the bar's integrity. *Matter of Horwitz*, 180 Ariz. 20, 29, 881 P.2d 352, 361 (1994).

2 In imposing discipline, it is appropriate to consider the facts of each case, the *Standards* and
3 the proportionality of discipline imposed in analogous cases. *Matter of Bowen*, 178 Ariz. 283, 286,
4 872 P.2d 1235, 1238 (1994).

5 Upon consideration of the facts, application of the *Standards*, including aggravating and
6 mitigating factors, and a proportionality analysis, this Hearing Officer recommends acceptance of
7 the Tender and the Joint Memo, which provide for the following:

8 1. Respondent should receive censure.

9 2. Respondent should be placed on probation for a period of one year, effective upon
10 the filing of the judgment and order, under the following terms and conditions:

11 a. Respondent shall contact the director of the State Bar's Law Office
12 Management Assistance Program (LOMAP) within 30 days of the date of the final
13 judgment and order. Respondent shall submit to a LOMAP audit of his office's trust
14 account procedures and calendaring procedures. The director of LOMAP shall
15 develop a probation contract, and its terms shall be incorporated herein by reference.

16 b. Respondent shall refrain from engaging in any conduct that would
17 violate the Rules of Professional Conduct or other rules of the Supreme Court of
18 Arizona.


19 c. Respondent shall complete the Trust Accounts Ethics Enhancement
20 Program (TAEEP) during the probationary period.

21 3. Respondent shall pay all costs incurred by the State Bar in connection with these
22 proceedings, including the assessment by LOMAP and applicable monitoring of the probation
23 contract.

24 4. In the event Respondent fails to comply with any of the foregoing terms, and the State
25 Bar receives information about his failure, bar counsel will file a Notice of Non-Compliance with the
26 disciplinary clerk. A hearing officer will conduct a hearing at the earliest practical date, but in no
27 event later than 30 days following receipt of the notice, and will determine whether the terms have
28 been breached and, if so, will recommend appropriate action in response to the breach. The State Bar

1 shall have the burden of proving non-compliance by clear and convincing evidence.

2 DATED this 1st day of August, 2006.

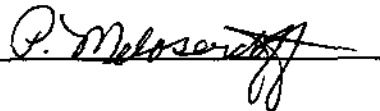
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4 
5 Patricia E. Nolan
6 Hearing Officer TY

7 ORIGINAL filed with the
8 Disciplinary Clerk of the Supreme
9 Court of Arizona this 1st day
10 of August, 2006.

11 COPY mailed this 1st day
12 of August, 2006, to:

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